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TABLE OF CASES.

STATUTES.

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

BLAMBERG BROTHERS, APPELLANT,
v.
UNITED STATES OF AMERICA, APPELLEE. } No. 165.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

BRIEF FOR THE UNITED STATES.

I.

STATEMENT OF FACTS.

The United States, through the Shipping Board, on July 26, 1920, sold an uncompleted hull, known as the barge *Catskill*, to the Guidera Towing and Transportation Company, upon the deferred payment plan (R. 6–8). The agreement of sale, substantially a bare-boat charter, required the purchaser-charterer to complete the hull, then to man and equip her, and to employ her for its account in its business. Title was to remain in the Government until the full purchase price was paid. The purchaser-charterer completed the barge, manned

and equipped her, and about August 6, 1920, carried a general cargo from the port of Baltimore to the port of Havana, Cuba. All bills of lading were issued by and in the name of the purchaser-charterer, who had the sole interest in all the contracts of affreightment. The purchaser paid the Government only the initial installment.

After the barge arrived at Havana, Cuba, seamen libeled her to recover wage claims stated at $3,725, and the barge was attached, taken into custody, and remained under attachment and in custody at Havana when libels for cargo losses on the Havana voyage, demanding damages aggregating $100,000, were filed upon in personam principles against the United States in the district courts of the United States for Maryland, Middle and Western Districts of Pennsylvania, and the Southern District of New York, under *assumed* authority of the suits in admiralty act, March 9, 1920. The barge then was worth less than $50,000. There can be no in personam liability of the Government as there was no privity of contract between the cargo owners and the Government.

The cargo libels, of which the present claim is one, proceed only upon *in personam* principles, without an election to have the libels proceed upon principles of liability *in rem*. They are all presented by the same group of proctors.

Blamberg Brothers is a corporation of Maryland, having its principal place of business in Baltimore, within the District of Maryland.

By leave of court, the Government filed a suggestion of want of jurisdiction (p. 10), stating these facts. It denied the libels could be maintained in any of the district courts, under authority of the suits in admiralty act, as the barge was under attachment and in custody in a foreign country, and without the jurisdiction of any district court.

The appellant now suggests the right to proceed under the suits in admiralty act solely because it has its principal place of business in Baltimore.

The district court, after hearing had upon the suggestion of want of jurisdiction and answer, denied jurisdiction. It held that if a private individual instead of the Government had been the owner of the barge, no action against the owner or the barge could have been maintained in any district court of the United States; relief, therefore, should have been sought in the jurisdiction—Cuba—where the barge physically was. Congress did not intend to make the United States suable under any circumstances in which a suit against the ship or her owner could not have been instituted in this country, were the ship privately owned. It did not intend to open the door of its courts, as against the United States, to suits for liabilities which could not have been prosecuted in the United States against an individual owner or his property. (272 Fed. 978.)

From a decree dismissing the libel, this appeal has been taken.

II.

THE SUITS IN ADMIRALTY ACT.

The pertinent provisions of the suits in admiralty act, March 9, 1920 (41 Stat. 525), by authority of which the libel is filed, may be thus paraphrased:

> Be it enacted * * * that *no vessel owned by* the United States * * * shall hereafter in view of the provisions herein made for a libel in personam *be subject to arrest or seizure by judicial process in the United States or its possessions.*
>
> SEC. 2. That in case where if *such vessel were privately owned* or operated * * * *a proceeding in admiralty could be maintained at the time of the commencement of the action* herein provided for, a libel in personam may be brought against the United States * * * provided that such vessel be employed as a merchant vessel * * *. Such suit shall be brought in the District Court of the United States for the district in which the parties so suing or any of them reside or have their principal place of business in the United States, *or in which the vessel or cargo charged with liability is found* * * *. In case the United States * * * shall file a libel in rem or in personam in any district, a cross libel in personam may be filed or a set-off claimed, *with the same force and effect* as if the libel had been *filed by a private party* * * *. Upon application of either party the cause may, in the discretion of the court, be transferred to any other District Court of the United States.

SEC. 3. *That such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties.* * * * Decree shall be subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction. *If the libellant so elects in his libel, the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained.* Election to so proceed shall not preclude the libellant in any proper case from seeking relief in personam in the same suit. * * *

SEC. 6. That the United States * * * shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners * * * of vessels.

SEC. 7. That if any vessel or cargo within the purview of sections 1 and 4 of this act is arrested, attached, or otherwise seized by process of any court in any country other than the United States * * * the Secretary of State of the United States in his discretion, upon the request of the Attorney General of the United States or any other officer duly authorized by him, may direct the United States consul residing at or nearest the place at which such action may have been commenced to claim such vessel or cargo as immune from such arrest, attachment, or other seizure, and to execute an agreement, undertaking, bond, or stipulation for and on behalf of the United

States, or the United States Shipping Board, or such corporation as by said court required for the release of such vessel or cargo and for the prosecution of any appeal * * *. The Attorney General is hereby vested with power and authority to arrange with any bank, surety company, person, firm, or corporation in the United States, its Territories, and possessions, or in any foreign country, to execute any such aforesaid bond or stipulation as surety or stipulator thereon and to pledge the credit of the United States to the indemnification of such surety or stipulator as may be required to secure the execution of such bond or stipulation. The presentation of a copy of the judgment roll in any such suit, certified by the clerk of the court and authenticated by the certificate and seal of the United States consul claiming such vessel or cargo, or his successor, and by the certificate of the Secretary of State as to the official capacity of such consul, shall be sufficient evidence to the proper accounting officers of the United States, or of the United States Shipping Board, or of such corporation, for the allowance and payment of such judgments: *Provided, however,* That nothing in this section shall be held to prejudice or preclude a claim of the immunity of such vessel or cargo from foreign jurisdiction in a proper case.

III.

HISTORY OF THE LEGISLATION

Section 9 of the original shipping act of 1916, approved September 7, 1916 (39 Stat. 728), provided:

> Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and license. Such vessels while employed solely as merchant vessels *shall be subject to* all laws, regulations, and *liabilities* governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or interest therein. (Italics ours.)

This court in the *Lake Monroe* (250 U. S. 246) construed this section as subjecting vessels owned or operated by the Government in merchant service to arrest or seizure for the enforcement of maritime liens. In order to obviate delays and consequent losses through seizure of the vessels, and the expenses incident to providing surety bonds, certain bills were introduced in Congress, which eventually passed as the act entitled "Suits in admiralty act" of March 9, 1920 (41 Stat. 525), which declared the *immunity of* ships owned or possessed by the Government *from arrest or seizure by judicial process in the United States or its possessions*, and provided a proceeding in admiralty against the Government for the faults of such vessels, measured by the same liabilities, principles of law, and rules of practice as would exist or become applicable

if such vessels had been privately owned or operated. A marginal reference to the history of this litigation is made. [1]

The scope of the jurisdiction provided by the act has been seriously questioned. The legislative history indicates that it must be measured by and limited to the liabilities considered by section 9 of the original shipping act. As the facts, however, of the present case determine the action can not be

[1] The legislative history of the suits in admiralty act is summarized: The original bill, known as S. 2253, was introduced in the Senate on June 23, 1919, and referred to the Committee on Commerce (66th Congress, 1st sess., Cong. Rec. p. 5869). On July 9, 1919, the same bill was introduced in the House as H. R. 7124 and referred to the Committee on the Judiciary (Cong. Rec. 7538). On August 28, 1919, the Committee on Commerce of the Senate held hearings on S. 2253. See report of hearing before the Committee on Commerce, United States Senate, S. 2253, upon which the committee submitted its report (No. 223, 66th Congress, 1st sess.), by which it reported back a new bill, No. 3076 (Cong. Rec., p. 6017). This bill was debated in the Senate (Cong. Rec., pp. 7317, 7439, 7440), and passed the Senate and was referred to the House and by it referred to the Committee on the Judiciary (Cong. Rec., 7538). The Committee on the Judiciary of the House held hearings on H. R. 7124, serial No. 4, and also on a substitute bill known as the Attorney General's substitute, which hearings are fully reported by serial 8, dated November 13, 1919, of the House Committee on the Judiciary.

On December 12, 1919, the Committee on the Judiciary submitted to the House its report (House Report No. 497), reporting the bill in a different form (Cong. Rec., 66th Congress, 2nd sess., p. 498). This report was debated (Cong. Rec., pp. 1678–1693, 1750–1759). The bill went to conference and the conference report, amending the bill as passed by the House, was reported (Senate Document No. 233) to the Senate (Cong. Rec., p. 3350), and agreed to by the Senate (Cong. Rec., p. 3690, 3691). It was also submitted in the House as H. R. 669 (Cong. Rec., p 3629), agreed to by the House (Cong. Rec., p. 3631), examined and signed (Cong. Rec., pp. 3864–3883), approved by the President March 9, 1920 (Cong. Rec., pp. 3864–3883), approved by the President March 9, 1920 (Cong. Rec., p. 4068), and became Public Act No. 156 (41 Stat. 525).

The hearings before the Committee on Commerce in the Senate were printed as of Thursday, August 28, 1919, while the hearings before the Committee on the Judiciary of the House were printed, the first hearing being Serial 4, dated August 28, 1919, and the second hearing being known as Serial 8, dated November 13, 1919.

presented under any authority of the suits in admiralty act, and was properly dismissed upon sound jurisdictional grounds, a review of the legislation seems unnecessary.

IV.

ARGUMENT.

By section 1 of the act Congress has declared Government-owned vessels immune from arrest or seizure in the United States or its possessions, and by section 7 has provided the necessary authority for defending actions abroad, if the vessels there are subject to arrest and detention. For the liabilities of such vessels declared immune from seizure and arrest (within the United States) at the time the libel is filed, Congress by section 2 has provided a limited remedy to enforce the vessel's liability by proceedings against the Government directly.

The act intended to make the United States suable only under circumstances in which a suit could have been instituted in this country if the vessel were privately owned and such privately owned vessel then could have been proceeded against.

In any view, Congress did not intend to make the United States suable unless suit upon the liabilities asserted could have been instituted in this country, had the vessel been privately owned rather than Government owned, and a proceeding could have been maintained against the vessel or her private owner, having the same relation to such vessel as the Government had to the *Catskill*.

Section 3 provides:

> * * * shall proceed and shall be heard and determined according *to the principles of law and to the rules of practice obtaining in like cases between private parties.* (Italics ours.)

Section 2 provides:

> * * * where if such vessel *were privately owned* a proceeding in admiralty could be maintained at the time of the commencement of the action herein * * * a cross libel in porsonam may be filed * * * with the same force and effect as if the libel had been *filed by private parties.* (Italics ours.)

Section 3 provides:

> * * * If the libellant so elects in his libel, the suits *may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned or possessed a libel in rem might have been maintained.* (Italics ours.)

When the present libel was filed, the *Catskill*—operated by bare boat charterers for their account, not by the Government—was under attachment for crew's wages in Cuba. The *Catskill* was worth less than $50,000, and the cargo-damage claims, represented by the present group of proctors, asserted against the Government in four different United States district courts, totaled $100,000. It cannot be stated or estimated what additional claims exist against the barge, *in rem* liabilities, nor can it be

termined in what priority the claims against the rge would attach. It is doubtful if, under the vs of Cuba, cargo losses or damages for delay can asserted against the barge.

If the *Catskill* had been privately owned, a libel *in n* against her only could have been maintained in a reign jurisdiction—Cuba. No libel could have en filed against her owner anywhere. There was privity of contract between owner and libellant. If the *Catskill* had been privately owned, all claim-ts presenting claims based, upon principles of *in n* liabilities, would have had to proceed against the ssel by libel in the jurisdiction where the vessel ysically was. No claim could be enforced against ch private owner. The claimants only could obtain isfaction of their claims to the extent of the value of e vessel or to the proceeds of sale if she be sold der direction of the court. Unless claimants did so, ims would be lost for all time. If the proceeds of e of the vessel proceeded against are inadequate to all claims in full, the moneys would be distributed their priorities are determined by the practices of court administering the fund. The Government e cannot be held personally responsible. There is privity of contract.

f the *Catskill* had been privately owned, no action ld have been maintained against the barge or her ners in any court of the United States.

The ruling must follow that the District Court of ryland was without jurisdiction. Libellant's sole edy was by proceedings against the barge then

under attachment in Cuba where all claims would be marshaled and adjusted as the equities and rules of practice and priorities there determined, under penalty of the claims thereafter being barred for all time against the vessel or the Government. If cargo owners now can maintain their libels in the different district courts of the United States, the Government may be responsible for the full payment of claims aggregating $100,000, while the *Catskill* is worth less than $50,000. A construction of the act which secures such unjust results must be denied.

The principles of law and the rules of practice, basically in like cases between private parties, require liabilities asserted upon *in rem* principles, to be presented against the vessel. Such suits can only be maintained in the district where the vessel physically is.

The Government well may rest its case upon the views of Rose, D. J., dismissing this suit, thus expressed (R. p. 16):

> "There is no reason to suppose that Congress intended to make the United States sueable under any circumstances in which a suit could not have been instituted in this country, were the ship or cargo privately owned, and yet if the libellants' contention be sustained, that will be the result here. There was no privity of contract between the United States and the shippers of cargo by the Catskill, nor has the United States done them any actionable wrong. If it were an individual no proceeding

in personam could be brought against it, either in admiralty or at common law. Nor could any libel be maintained against the ship in rem in any court of the United States, because none of them could have taken possession of her. The grant of jurisdiction made by the second section of the act is expressly limited to such proceedings as could be maintained at the time of the commencement of the action herein provided for, and in the instant case at that time there was no court in the United States in which the suit could have been maintained either in rem or in personam, had an individual occupied the same relation to the cause of action as was borne by the United States.

"Nor is this a narrow construction. It is one in perfect harmony with the most liberal and far-reaching purpose which can reasonably be attributed to Congress. To hold that it intended that a citizen should be no worse off because of Government ownership, is as far as anyone will be justified in going. There is no reason to suppose that it intended to open the doors of its courts as against the United States to suits which could not there have been prosecuted against an individual or his property. The general language of every statute must be read in the light of the legislative intent in so far as that is unmistakably ex pressed."

Rogers, C. J., speaking for the United States Circuit Court of Appeals in an opinion just handed down (November 25, 1922), in the case of the

Cunard Steamship Company (Ltd.) v. *United States as owner of the S/S Isonomia*, printed in full as an appendix to this brief (p. 20), confirms Judge Rose's opinion, saying:

> We find ourselves in full accord with the doctrine laid down in the above case.

This opinion is decisive of the questions presented by this appeal.

In *Alsberg* v. *United States* (D. C. S. N. Y.) unreported (Appellant's Brief, p. 40), Mack, C. J., said:

> Judge Rose, in *Blamberg Bros.* v. *U. S.* (272 Fed. 978), has held, and in my judgment correctly, that if *at the time the proceeding is brought the vessel is not within any jurisdiction in the United States the libel is not maintainable.* The reason is not that the vessel is free from liability, but that when neither a privately owned vessel nor its owner could be sued in any court of the United States, the act should not be construed, in the absence of express provision, to subject the United States to suit under similar circumstances. (Italics ours.)

In *Phoenix Paint & Varnish Company* v. *United States*, unreported (appellant's brief, p. 45), Dickinson, D. J. (E. D. of Pa.), said:

> The basis of the exceptions taken to the libel, as we grasp the thought back of them, can be best presented by a citation of the case of *Blamberg Bros.* v. *United States* (272 Fed. Rep. 978), upon which the respondent relies.

> That case, however, is not in point. It was ruled upon the proposition that the act of Congress gave no permission to proceed unless the libel be one which could be sustained if it were against a private person or the property of a private person. The libel there could not have been so sustained, and what would follow the ergo is too obvious to require statement.

In the case of *Lucian V. Axtell, administrator of the estate of Cornelius L. Verhoef, deceased*, v. *United States*, Garvin, D. J., without discussion, held defective libel for death of seaman, because it did not allege that at the time the libel was filed the ship was found within this district, citing *Blamberg Bros.* v. *United States.*

Since the filing of the opinion of *A. Marion Smith* v. *United States*, which apparently is to the contrary, and much relied upon by the appellant (appellant's brief, p. 37), Judge Foster, of *the District Court, has granted a rehearing to the Government for the review of his ruling upon the jurisdictional questions.*

This opinion has been squarely overruled by the case of *The Cunard Steamship Co. (Ltd.)* v. *United States, supra.*

Statutes, by which the consent of the sovereign to be sued is granted, must be constructed strictly. (*Schillinger* v. *United States*, 155 U. S. 163.)

Emphasized, the admitted facts of the present case determine that the appellant can not maintain its libel under authority of the suits in admiralty act.

A discussion of the application or construction of the venue provision of section 2 of the act, upon which the appellant bases its right to maintain the libel in the district court, is unimportant. No action upon the liabilities asserted then could be prosecuted against the Government under authority of the act.

Proctors for the appellant, at the time the libel was filed, believed this construction of the act to be proper, for by article 3 of the libel (R. p. 2), the basis of the suit is:

> That the said *barge Catskill is now*, or will be, during the pendency of process hereunder, within this district and *within the jurisdiction of this honorable court.* (Italics ours.)

And by the prayer of the libel:

> Your libellant prays that * * * the said respondent be required to appear and answer all and singular the matters aforesaid according to the *principles of law and the rules and practice obtaining in like cases between private parties.* (Italics ours.)

V.

IMPORTANCE OF QUESTIONS.

The Shipping Board has sold large numbers of vessels upon the deferred payment plan (substantially bare-boat charters), receiving only a small initial payment. The purchasers-charterers have placed them in service, entered upon contracts of affreightment, incurred collision losses, and have subjected the vessels to other classes of lien claims. Later the purchasers-charterers have become hope-

lessly insolvent and lien claimants then have endeavored to impose upon the Government, through the same construction of the statute which is sought in this case, unlimited liability for such losses, which in many instances, at the time the libels are filed, greatly exceed the value of the vessels. In several instances claims aggregating several hundred thousand dollars have been presented against the Government, when, at the time the libels were filed, the vessels were only worth a few thousand dollars. This emphasizes the immediate importance of requiring libels asserting liabilities upon in rem principles, being filed in the district where the vessel charged with liability physically is.

The Government, believing its construction of the act now contended for is proper, and that in no event could its liability exceed the then value of the vessel, promptly took steps in such proceedings to surrender the vessel into the custody of the court and to have all claims against the Government, because of its ownership or possession of the vessel, heard and determined as if the vessel had originally been proceeded against. As there was no privity of contract, the Government can not be held responsible upon principles of in personam liability.

The practical result of such procedure has been to accomplish the sale of the vessel and to require all claimants having in rem claims against the vessel to present them against the proceeds of sale. If the practice is not sound the Government will be unjustly called upon to pay millions of dollars in

claims. In the same situation the private owner could not be proceeded against at all. All claimants could only proceed against the vessel, marshal their claims against the vessel, and then receive in full satisfaction of their claims their share of the proceeds of the sale of the vessel.

In this view, suits for claims existing upon in rem principles must be filed against the vessel when she is in a foreign jurisdiction, and, where the vessel physically is within the United States, must be prosecuted in the district or the jurisdiction where the vessel actually is. This suggests the necessity for requiring the libellant, where his liability is based solely upon in rem principles, to elect to have his suit proceed upon principles of liabilities in rem, as section 3 of the act specifically requires. The appellant here has not made such election.

The Government suggests the urgency of an immediate ruling by this court upon the propriety of the practice reviewed, by which it elects to surrender vessels, charged with in rem liabilities, into the custody of the court, and requiring in rem claimants to assert their liabilities against the vessels or the proceeds of their sale, under penalty of being barred from further proceeding against the Government or the vessel.

VI.

THERE HAS BEEN NO WAIVER OF JURISDICTION.

The United States, by appearing generally and answering in this suit, has not waived any jurisdictional question.

The appellant (brief, p. 28) suggests, by appearing and answering the libel, the Government has waived its right to object to the jurisdiction of the District Court. As a matter of law this can not be. A review of the litigation denies this.

The libel presents a claim for cargo damage. By article third (R. p. 2), jurisdiction was thus based:

> That said barge *Catskill* is now, or will be during the pendency of process hereunder, within this district and within the jurisdiction of this honorable court.

It did not state the barge physically was in Cuba. The United States attorney filed an answer (R. p. 4) stating the barge was in Havana. He then, by further defense, pleaded the facts determining the status of the *Catskill*, and asked that the libel be dismissed.

The libel thus asserted jurisdictional facts which suggested the right to proceed under the suits in admiralty act.

At the direction of the Attorney General, the United States attorney, leave of court being first had, then filed a suggestion of want of jurisdiction. All the facts stated therein were admitted by answer. These facts are entirely different from the averments of the libel, upon which the right to proceed by authority of the suits in admiralty act was predicated. The question of jurisdiction was then heard upon the suggestion of want of jurisdiction and the reply. The court sustained the Government's views and dismissed the libel.

With this history there can be no merit in the appellant's suggestion—the Government has not

waived any rights. Even if the libel had alleged the vessel to be in Cuba instead of the district of Maryland, as it did, as a matter of law an appearance by the United States attorney and an answer could not create or confer jurisdiction upon the district court, if the court in fact was without jurisdiction.

VII.

CONCLUSION.

The appeal must be dismissed.

Respectfully,

JAMES M. BECK,
Solicitor General.
ALBERT OTTINGER,
Assistant Attorney General.
J. FRANK STALEY,
Special Assistant to the Attorney General in Admiralty.
NORMAN B. BEECHER,
Special Counsel in Admiralty to the United States Shipping Board.

APPENDIX.

United States Circuit Court of Appeals for the Second Circuit. The Cunard Steamship Company (Ltd.), libelant-appellant, *v.* United States of America, as owner of the S. S. *Isonomia*, respondent-appellee.

Before: Rogers, Manton, and Mayer, circuit judges.

Lord, Day & Lord, for libelant-appellant.

Allen Evarts Foster, George deForest Lord, advocates.

William Hayward, United States attorney, for respondent-appellee.

Ralph B. Romaine, special assistant in admiralty to the United States attorney, advocate.

This is an appeal from a final decree entered in the United States District Court for the Southern District of New York on March 1, 1922.

The libelant is a corporation organized and existing under the laws of the United Kingdom of Great Britain and Ireland. It has its principal place of business at Liverpool, England. Its principal place of business in the United States is in the city of New York.

The respondent was and is at the times hereinafter mentioned the owner of the steamship *Isonomia* which at the times hereinafter mentioned was employed by respondent as a merchant vessel.

The libel alleges that on August 30, 1920, a contract was entered into by and between Victor S. Fox & Co. (Inc.), as agents for the S. S. *Coosa*, then owned by the United States and the libelant whereby it was agreed that the said S. S. *Coosa* should be

berthed and wharfed at libelant's Pier 32, North River, at the rate of one hundred eighty-five dollars ($185) per day, while the vessel was loading or while any part of her cargo remained on the pier, together with the expense of lights, water, and telephones, and any other expenses incurred by the libelant by reason of the berthing of said vessel at said pier, all of which was to be paid by said S. S. *Coosa* to the libelant as the agreed wharfage.

It further alleges that pursuant to said agreement on September 2, 1920, cargo was deposited on said pier by Victor S. Fox & Co. (Inc.), as such agents and further cargo was so received on said pier thereafter and remained on said pier up to and including September 22, 1920.

And it alleges that on September 20, 1920, by consent of the parties to said contract, the S. S. *Isonomia*, for which vessel said Victor S. Fox & Co. (Inc.) were also agents, was substituted for the S. S. *Coosa*, and on said day S. S. *Isonomia*, then and now owned by the respondent, berthed at said pier and thereafter said cargo was laden on board her.

It then claims that by virtue of the facts alleged a lien in favor of the libelant exists against the *Isonomia* pursuant to section 30, subsection P, of the act of June 5, 1920, known as "the ship mortgage act."

And it claims that by reason of the premises stated the respondent became and is now indebted to libelant for wharfage for twenty-one (21) days at the rate of one hundred eighty-five dollars ($185.00) per day and for expenses amounting in all to the sum of $3,914 with interest thereon from September 22, 1920.

And the libel further states that libelant "elects that this libel shall proceed in accordance with the principles of libels in rem."

The United States appeared specially and without submitting to the jurisdiction of the court excepted to the libel in the following particulars:

> 1. In that it is not alleged in the libel that the S. S. *Isonomia* or its cargo at the time of the filing of the said libel was found within the Southern District of New York and within the jurisdiction of this honorable court.
>
> 2. In that the facts alleged in the said libel do not constitute a cause of action in rem in admiralty.

And it was prayed that the libel be dismissed. The court below sustained the exceptions and dismissed the libel.

ROGERS, *Circuit Judge* (after stating the above facts):

The libel claims a lien upon a ship in her home port for wharfage furnished in aid of her loading. But before considering that there is a preliminary question which must be first considered and the determination of that question may make it unnecessary to refer to any other. It appears that the libel does not allege that the vessel sought to be charged with liability was at the time of the filing of the libel found in the Southern District of New York in which the libel was filed. The respondent, therefore, insists that the District Court was without jurisdiction to entertain the suit.

The suit is predicated upon the assumption that a suit in admiralty can be maintained against the United States. If that assumption be well founded it must be because some statute has conferred the right. For no principle is better settled than that a

broad distinction exists between the existence of a right and the power to enforce it in a court of justice. And the United States like all other sovereignties can not be impleaded in a judicial tribunal except in so far as it has consented to be sued. (*Cotton* v. *United States*, 11 How. 228, 231.) This makes it necessary to inquire whether Congress has consented that the United States can be sued in admiralty, and if so, to what extent.

On March 3, 1887, Congress passed the Tucker Act, which authorized certain suits against the Government to be brought in the Court of Claims, including suits upon any contract with the Government, or for damages, liquidated or unliquidated, in cases not sounding in tort, "in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty if the United States were suable." (24 St., ch. 359, p. 505.) The district courts were given concurrent jurisdiction where the amount of the claim did not exceed $1,000. The circuit courts were given concurrent jurisdiction where the amount exceeded $1,000 and did not exceed $10,000.

On September 7, 1916, Congress passed the act creating the United States Shipping Board. Section 9 of that act provided as follows:

> Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and license. Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein. (U. S. Compiled Statutes, sec. 8146e, p. 8651.)

The act of 1916 came before the Supreme Court in the *Lake Monroe* (250 U. S. 246). That vessel, which was owned and operated by the United States, had collided with the *Helena* off the coast of Cape Cod, and the district court in Massachusetts, a libel having been filed against the *Lake Monroe,* issued process for the seizure of the ship. The Supreme Court held that because of the act of 1916, in spite of her ownership by the United States, the vessel was subject to the same arrest as any vessel privately owned.

The arrest and seizure of Government-owned merchant vessels was regarded as detrimental to the public interest. While it was recognized as proper that the United States should permit suits to be brought in admiralty against the Government, it was deemed wise to restore the immunity of such vessels from seizure which had been taken away by the shipping act of 1916. As respects Government vessels of war or those employed in the revenue service of the Government, they were always exempt from seizure, their immunity from arrest not having been taken away by the act of 1916. The consequence was that in 1920 Congress passed the suits in admiralty act, which provided that no vessel owned by the United States should be subject to arrest or seizure by judicial process (41 St. 525). In other words, it restored the immunity from seizure which merchant vessels owned by the Government possessed prior to the act of 1916, and it declared that a suit in personam in admiralty might be brought against the United States in a case where, if the vessel had been privately owned or operated, a proceeding in admiralty could be maintained at the time of the commencement of the action. Then the act went on to provide, as already set forth, that such suits shall

be brought in the district court "for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found."

This is the act upon which the libelant's right to maintain this suit depends, and the meaning of that act we are now called upon to determine. Section 1 of the act provides:

> That no vessel owned by the United States * * * shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions. * * *

And section 2 provides:

> That in cases where if such vessel were privately owned or operated, * * * a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States, * * * provided that such vessel is employed as a merchant vessel * * *. Such suits shall be brought in the District Court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States or in which the vessel or cargo charged with liability is found.

In interpreting the act, permitting, as it does, a suit to be brought against the United States, we must follow the rule of strict construction. This follows from the fact that the United States can not be sued without their consent, and if Congress in certain cases gives its consent, the courts are con-

fined to the letter of the statute which expresses such consent. (*Schillinger* v. *United States*, 155 U. S. 163, 166.) And all the provisions of such a statute are jurisdictional. As the liability and the remedy are created by the statute the limitations of the remedy are regarded as limitations of the right. (*The Harrisburg*, 119 U. S. 199, 214.)

Congress has the power not only to say in what kind of cases the United States may be sued but in what court the suit may be brought.

There are two kinds of suits in admiralty, one being a suit in personam, the other a suit in rem. One is a suit against a person and the other against the vessel. In many cases the libelant may sue either in rem, against the vessel, or in personam, against the owner, as he prefers. Thus in cases of collision the ship may be sued in rem, as the offending thing which caused the injury, or the libelant may elect to sue the owners in personam because of the negligence of those in charge. And similarly in cases of cargo damage the suit may be in rem, against the ship, or in personam, against the owners, either for their negligence or for breach of the contract safely to carry. And there are cases in which there may be a joinder of proceedings in rem and in personam. (See Benedict's Admiralty, 4th ed., sec. 294.) Admiralty rule 13 declares that "in all suits for mariners' wages or by material men for supplies or repairs or other necessaries, the libelant may proceed in rem against the ship and freight and/or in personam against any party liable." And rule 14 declares that "in all suits for pilotage or damage by collisions the libelant may proceed in rem against the ship and/or in personam against the master and/or the owner."

It is necessary in construing the act of 1920 to keep in mind the above principles.

These rules were promulgated on March 7, 1921, and the suits in admiralty act, as already stated, was adopted on March 9, 1920, or a year prior. However, prior to the adoption of these new rules the old admiralty rules 12 to 20 had allowed in certain cases, as was held in the *Corsair* (145 U. S. 335), a joinder of ship and freight, or ship and master, or alternative actions against ship, master, or owner alone; but in no case within those rules could ship and owner be joined in the same libel. The Supreme Court in the *Corsair* case had expressly left the question open as to whether ship and owner could be joined in the same libel in cases not falling within those rules. But other courts had expressly held in favor of joinder in such cases and in Benedict's Admiralty, section 294, that distinguished authority had declared that the advantage of such right was so obvious and the objections thereto so technical that there could be little doubt that the practice would be upheld if the question was ever presented to the highest court.

In the light of the rules of procedure referred to it seems obvious to us why Congress adopted the venue clause found in section 2 of the act of 1920. In cases in which the libelant has an alternative remedy he may avail himself of the alternative venue. The possible alternative venue relates and relates only to cases in which there is an alternative remedy. In other words if there is a liability of a vessel and a concurrent liability of the owner, the libelant may, under section 2 of the act of 1920, sue where he has his principal place of business or where he finds the vessel. As the United States may be said to be

domiciled everywhere within their territory, the rule so construed is exactly the same as between private parties in a suit against the owners of a vessel. The United States being everywhere within their territory, the libelant may sue in personam in the district where he resides and obtain jurisdiction of the respondent, or he may sue in rem where he finds the vessel without concerning himself with the whereabouts of the owner. But where there exists solely the liability of the vessel and no liability of the owner, the libelant must sue under the act of 1920, as prior to the act, only in the district in which he finds the vessel. We arrive at that conclusion as we are convinced that the purpose of the act was to place the United States on exactly the same footing as a private party. That this was the intent appears from the language of section 2 declaring "that in cases where if such vessel were privately owned or operated" a proceeding in admiralty could be maintained "at the time of the commencement of the action herein provided for" a libel in personam may be brought against the United States provided the vessel was employed as a merchant vessel, etc. We understand this to mean that where no right of action would exist between private parties none would exist against the United States. And in the instant case it is admitted that had the *Isonomia* been privately owned instead of by the United States no suit against her, on the cause of action alleged in the libel, would lie except in the district where she was found.

The general language of the provision as to venue found in section 2, as of every part of the act of 1920, must be read in the light of the legislative intent so far as that intent is clearly expressed. Read in the light of that intent we construe the pro-

The conclusion we have reached on the question discussed is supported also by *Galban Lobo & Company* v. *United States*, decided by Judge Augustus N. Hand in the Southern District of New York on June 26, 1922, and not yet reported; and by *Axtell* v. *United States*, decided by Judge Garvin in the Eastern District of New York on September 20, 1922, and not yet reported. The case of *Middleton & Company* v. *United States* (273 Fed. 199), decided by Judge Smith in the Eastern District of South Carolina, asserts a contrary doctrine. And so does the case of *Smith* v. *United States*, decided on August 4, 1922, in the Eastern District of Louisiana and not yet reported, as well as that of *Alsberg* v. *United States*, decided by Judge Mack in the Southern District of New York on September 15, 1922, which is not yet reported.

Inasmuch as in our opinion the court below was without jurisdiction to entertain the libel, the *Isonomia* not being found within the district, we find it unnecessary to consider whether the agreement upon which the libel is based was a wharfage agreement and whether all the services rendered thereunder were wharfage services or whether a lien for wharfage of a domestic vessel exists under the general maritime law or under the act of June 5, 1920.

Decree affirmed.

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